No. 12385

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARL W. TAYLOR,

Appellant,

vs.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF PLEADINGS AND FACTS

Appellant on August 13, 1949 filed in the United States District Court for the Western District of Washington, Southern Division, his petition for a writ of habeas corpus, asserting that his sentence was void and his imprisonment illegal. (Tr. 1 - 22). The appellant therein challenged the legality of his deten-

tion upon the grounds that Title 26 U.S.C.A. 145(b) with regard to acts committed by appellant as described in the indictment, being in conflict with other subdivisions of said section, was repealed thereby. (Tr. 18).

Appellant with his petition filed an affidavit of bias and prejudice on the part of the District Judge against the appellant. (Tr. 23 - 27).

The District Court on August 18, 1949 issued its order denying appellant relief upon his affidavit of prejudice and directing appellee to show cause on August 24, 1949 in the matter of the detention of appellant. (Tr. 28 - 32).

To the order to show cause appellee on August 19, 1949 filed his Answer and Return (Supp. Tr. 1 - 3) and produced in court the body of appellant at the time of hearing on August 24, 1949. (Tr. 33).

Thereafter the District Court made and entered its findings of fact and conclusions of law (Tr. 33 - 38); and based thereon an order denying appellant's petition and dismissing the action was entered in this cause (Tr. 39 - 40). From that final order, the appellant has been permitted to appeal in forma pauperis. (Tr. 41 - 50) in this cause Dkt. No. 1270 below, and denied such permission in Docket No. 1269 below. (Tr. 51 - 69).

The facts material to a determination of appellant's right to discharge from present confinement as disclosed in the record, may be summarized as follows:

An indictment containing four counts for violation of 26 U.S.C.A. Sec. 145 (b) was returned in the United States District Court for the Northern District of California, Southern Division on February 16, 1949 against appellant for false reporting of income tax with intent to defeat and evade the tax due to the United States. The appellant plead guilty to Count 2 which involved a return for 1945, and the other counts were dismissed.

Appellant was sentenced on March 2, 1949, to a term of five years imprisonment and to pay costs of $50.00 and was received at the United States Penitentiary, McNeil Island, Washington on April 27, 1949, where he is now confined pursuant to said judgment and commitment. (Tr. 34).

Appellant has reputedly sought relief by way of motion to vacate the judgment, filed with the trial court, as well as sought relief in other petitions and on other grounds presented to the District Court from which this appeal is taken. (Tr. 8 - 10).

The appellant at time of hearing having by way of oral traverse admitted all the factual allegations

of the return, the District Court found "that there is no issue of fact in this matter before the court, and petitioner does not contend there is". (Tr. 33 - 38).

QUESTION PRESENTED

Is it within the scope of review on habeas corpus to determine between whether the sentence of appellant can be sustained under Section 145(b) of the Internal Revenue Code or under Section 3616?

ARGUMENT AND AUTHORITIES

The statute, under which the indictment was returned, Title 26, U.S.C.A., 145(b) reads in pertinent part as follows:

> " * * *, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Appellant, however, in his specifications of Errors (Appellant's Brief page 6) prefers the provisions found in Title 26 U.S.C.A., Section 3616(a) and (b) which in pertinent part reads as follows:

"Whenever any person —

(a) False returns. Delivers or discloses to the

collector or deputy any false or fraudulent list, return, account or statement, with intent to defeat or evade the valuation, enumeration or assessment intended to be made, or

(b) * * * * *
he shall be fined not exceeding $1000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

While appellant's arguments advanced in his brief seem to have somewhat strayed from the points asserted in his petition, they are essentially to the point that 145(b) does not sustain the indictment.

It should be observed that appellant's principal basis for his contention is that the assessment of tax must be made before any attempt to evade or defeat such tax can properly be alleged, and that the indictment returned in 1946 charging fraud in a return for 1945, prior to assessment on May 2, 1947 would be ineffectual under the provisions of said section 145(b).

Appellant has not cited any decision or legal authority for his position, being content, perhaps, to rely upon his familiarity with the statutes involved through his previous practice as an accountant, and the study of such law in that conection, to which he testified at time of hearing in the District Court, as sufficient authority for all of his statements.

The court decisions do not appear to lend support to the proposition advanced by appellant that taxes may not be evaded by an act committed prior to their assessment.

See *United States v. Gold*, 53 F. Supp. 848; and *Auerbach v. United States*, 136 F. (2d) 882.

Unlike appellant, counsel for appellee feel no immediate urge or need for delving into the genealogy of internal revenue provisions and would, therefore, confine their observations to whether or not the relief sought by appellant is available in these proceedings.

In the case of *Berkoff v. Humphrey*, 159 F. (2d) 5, involving a similar question of statutes applicable to tax matters, the court after observing the course of criminal proceedings afforded the defendant, at page 7, had this to say:

> "The hearing on habeas corpus is not in the nature of an appeal nor is it a substitute for the functions of the trial court. This is true as to controverted issues of fact and as to disputed issues of law 'whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court'. *Henry v. Henkel*, 235 U.S. 219, 229, 35 S. Ct. 54, 57, 59 L.Ed. 203. 'It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Other-

wise every judgment of conviction would be subject to collateral attack and review on habeas corpus on the ground that no offense was charged or proved'. *Knewel v. Egan*, 268 U.S. 442, 446, 45 S.Ct. 522, 524, 69 L.Ed. 1036."

* * * *

"The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of habeas corpus when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power."

* * * *

"But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

And upon the bases of the question of which statute would be applicable in that instance, the court in *Berkoff v. Humphrey*, concluded:

"No exceptional circumstances called for the issuance of the Writ. If the sentence of which appellant complains is illegal, it should be vacated by the court which entered it and not nullified on collateral attack by a court of coordinate jurisdiction. See *Terrell v. Biddle*, 8 Cir. 139 F. (2d) 32, 33."

The procedure outlined as above in the Berkoff case, was initiated by the appellant, but he has been unwilling to await the orderly processes of the law, and instead has set in motion at least three appeals

to this court to determine the legality of his conviction.

Notwithstanding the number of appeals now prosecuted by the appellant, in the instant appeal the appellant has in his designation and brief interposed an assortment of claims that do not involve his right to relief in these proceedings.

Appellant's brief also seeks to involve the questions of illegal search and seizure, self-immunity, and being compelled to be a witness against himself in the matter of preliminary investigations. These are raised for the first time in the appellate court. It is appellee's contention that appellant's conviction rests upon a voluntary plea of guilty and not upon evidence obtained through search and seizure, and for the further reason these matters are not at issue in these proceedings.

See *Harlan v. McGourin*, 218 U.S. 442;
Cash v. Huff, 142 F. (2d) 60;
Miller v. Hiatt, 141 F. (2d) 690;
Burrall v. Johnson, 134 F. (2d) 614; and
Graham v. Squier, 132 F. (2d) 681.

CONCLUSION

For the foregoing reasons, it must be contended the decision below should be affirmed.

Respectfully submitted,

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